IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 19——

No. 840

NOBLE DRILLING CORPORATION,
Petitioner

versus

EUNICH P. SAUNIER,
Respondent

Opposition to Petition For A Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the United States:

Respondent, EUNICH P. SAUNIER, herein opposes the granting of the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. Respondent waives discussion of Citations to Opinions Below, Jurisdiction and Statement of the Case on the grounds that they are adequately stated in the Petition for Writ of Certiorari. Respondent does oppose the Ques-

tions Presented for Review and the Reasons for Granting the Writ as stated in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

A) Whether the jury in the case at bar was adequately instructed that the submersible drilling barge had to be in "navigation" to support a jury finding of jurisdiction under the Jones Act, 46 U.S.C. § 688 and unseaworthiness of the drilling barge.

B) Whether the definitions normally used in litigation of this type in the trial courts generally charge on "status," in effect, direct the result the jury is to reach on those issues thereby preventing the jury from reaching an impartial and uninfluenced determination.

OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

Supreme Court Rule 19 provides that certiorari will be granted only where there are special and important reasons therefor. With respect to petitions for writs to the United States Court of Appeals, this Court looks to the question of whether the Court of Appeals' decision is in conflict with other Court of Appeal decisions or in conflict with applicable state or federal law or in conflict with decisions of this Court or, more generally, departs from, or sanctions departure from, the accepted and usual course of judicial proceedings. None of these considerations are extant in the present petition. Quite to the contrary, the growth of the jury instructions respecting application of Congressional and general maritime law to

the off-shore oil industry in the Gulf of Mexico has achieved remarkable uniformity. Since this Court's decision in *Gianfala v. Texas Company*, 350 U.S. 879, the Court of Appeals for the Fifth Circuit has reviewed the jury charge here challenged no less than three times in *Offshore Co. v. Robison*, (5 Cir.) 266 F.(2d) 769, *Adams v. Kelly Drilling Co.*, (5 Cir.) 273 F.(2d) 88 and now *Saunier v. Noble Drilling Co.*, 335 F.(2d) 62, each time affirming it.

Even more discouraging to a grant of certiorari is the fact that, as to Petitioner's concern for a jury charge on the concept of "being in navigation," the District Court in the instant case thoroughly charged the jury on this precise point. This is demonstrated in the subsequent Discussion of the Issues.

With respect to this Court's decision in *Roper v. United States*, 368 U.S. 20, petitioner has consistently argued that something revolutionary occurred in *Roper*. Suddenly, all that has gone before is prologue and this Court reversed long-standing and uniform rules of law, says petitioner. Quite to the contrary, *Roper* states that the duty of seaworthiness exists only with respect to vessels in navigation. Moreover, *Roper* was simply the affirmance of a finding of fact by a trial judge. There is nothing more ambitious stated in the *Roper* decision and certainly no hint that this Court intended to overrule *Gianfala v. Texas*, 350 U.S. 879; *Senko v. La. Cross Dredging Co.*, 352 U.S. 350, *Offshore Co. v. Robison*, (5 Cir.) 266 F.(2) 769, and *Adams v. Kelly Drilling Co.* (5 Cir.) 273 F.(2d) 88.

The simple fact of the matter is that petitioner has lost his law suit before the jury, lost a motion for judg-

ment n.o.v., lost his appeal to the Fifth Circuit Court of Appeals, and lost a motion for rehearing. Now, confronted with this Court's first imperative for jury trial in *Gianfala v. Texas Co.*, supra, and the body of instructional law fashioned by the District Courts in the Gulf Coast States and affirmed by the Fifth Circuit Court of Appeals in *Offshore Co. v. Robison*, supra, and *Adams v. Kelly Drilling Co.*, supra, and, again, in the instant case, petitioner seeks one final appeal to this Court. The short answer to these endeavors was phrased by Chief Justice Taft in *Mangum Co. v. Coty*, 262 U.S. 159, 163, more than forty years ago:

> "The jurisdiction (of the Supreme Court to review cases by way of certiorari) was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Petitioner shows no conflict of decisions in either state or federal courts. Petitioner cites no "special or important reasons" for the grant of its petition. The trial and appellate court process of fashioning jury instructions found herein does not depart from the "accepted and usual course of judicial proceeding." To the contrary, it pursues that very course. Petitioner is a disappointed litigant who disagrees with well-established law. This, respondent submits, is insufficient basis for a grant of a writ of certiorari.

DISCUSSION OF QUESTIONS (A)

Respondent disagrees with petitioner's statement of the issue in Question (A) for the simple reason that the

District Court adequately charged the jury with respect to the requirement that the drilling rig involved herein be a "vessel in navigation." Respondent refers the Court to the following portions of the general charge by the District Court:

TRIAL BRIEF, Vol. II, p. 469:

> "Now, in this suit, the plaintiff has the burden of proving by a preponderance of the evidence, that the rig W W-1 was a vessel, that it was a vessel in navigation, and this is a term which I shall explain more fully later on in the charge, that he was a member of the crew, and that he was injured through the negligence of the owner of the vessel, or its officers or employees, other than the plaintiff himself. Now, that is the basis, under the Jones Act.
>
> "Now then, I have stated that he has also alleged, and makes it a basis for his suit, that the vessel was unseaworthy."

TRIAL BRIEF, Vol. II, p. 475:

> "Now, the essential and decisive element, of the definition of a member of the crew, or that the vessel be in navigation, that he has a more or less permanent connection with the vessel. That is to say, that the seaman must have a more or less connection with the W W-1, and that he be aboard the vessel in a capacity which contributed to the accomplishment of the vessel's mission."

TRIAL BRIEF, Vol. II, p. 476 - 478:

> "The term applying to navigable waters, does not mean that the vessel must, at the very moment

of the injury, have actually been in motion on navigable waters. Nor does it matter that the structure itself was not self-propelled.

"I gave you that a little bit out of place.

"Now, a ship or vessel that is in navigation, although docked, it remains in readiness for another voyage, a vessel is not in navigation if there is no present hope or intention of having her go to sea, or be put to use in her usual calling. If it would take a long time to put her into shape for a voyage or use as a vessel, for example, a ship is not in navigation which has been laid up for the winter. Of course, we do not have that situation here. I have merely cited to you as an example, when a vessel would not be in navigation. She might be afloat, she might be moored to a wharf, or she may be anchored, and she would be in navigation. But, if she were laid up for the winter, then she would not be in navigation during that period. A ship is in navigation however, if on returns from a voyage of use, is taken to a dry dock to undergo repairs preparatory to making another trip. The fact that navigation is not the principal use to which the vessel is being put, does not negative the Jones Act coverage. The fact that a vessel is moored to a wharf, to perform a function as a dredge, or sunk to the bottom to perform a function as a drilling rig, does not in itself preclude Jones Act coverage of a person employed aboard. As long as a vessel is buoyant, capable of being floated from one location to another to accomplish her mission, members of her crews, meaning everyone employed aboard, on a more or less permanent basis, may be covered by the Jones Act, depending upon, among other

things, their duties aboard the vessel.

"Now, the term 'vessel' is understood, I have already given you that.

"The fact that the barge was anchored by resting on the bottom at the time Saunier was aboard, is not the sole and controlling factor in determining whether he was or was not a member of a crew of a vessel of navigation. You are to consider what his duties would have been, not only during the drilling operations, but also during the time that the barge was raised and moved, and lowered to another location."

Respondent contends that this adequately charges the jury on the issue of "vessel in navigation" taken in context with the charge as a whole. Petitioner's dispute is with the "general charge" of the District Court. *Petition for Writ of Certiorari p. 3.* Faced with the foregoing charges actually given by the District Court, petitioner suggests that "(s)ufficient emphasis was not placed on this question by the court below . . ." because of this Court's decision in *Roper v. United States*, 368 U.S. 20 (1961). In the first instance, it is most difficult to conceive how a decision by this Court could effectively work a "change of emphasis" in the adminstration of the Jones Act. Query: What is petitioner asking this Court to do? Is the certiorari jurisdiction of this Court to be used to measure and alter, confirm or correct not only the law as stated in jury charges, but also the verbal emphasis given by the trial judge in an essentially correct charge? This task, if in fact it is possible of effectuation, is one better suited to an appellate court.

More to petitioner's point, however, this Court's decision in *Roper* demands no such added emphasis. To begin with, *Roper*, was not a jury case. A District Judge found as a fact that the *S/S HARRY LANE*, a deactivated Liberty Ship, was not in navigation and hence the duty of seaworthiness was not owed to a longshoreman injured aboard the vessel. This court affirmed the finding of fact as not clearly erroneous. What is more, the *S/S HARRY LANE* had been removed from navigation in 1945 and the issue was whether she had been returned to navigation in 1954. Given this Court's opinion in *Roper*, apparently a finding by the trial judge, that the vessel *was* in navigation would likewise have been affirmed. If a rule may be distilled from *Roper*, it is that the question of "being in navigation" is one for the trier of fact. This Court had, long before *Roper*, held that the same rule applied to submersible drilling barges such as the one here involved. *Gianfala v. Texas Co.*, 350 U.S. 879. In this context, *Roper* is only of academic interest. The W W-1, the drill barge involved herein, was built precisely for the task on navigable waters that she was performing when EUNICH P. SAUNIER was injured. She could have been raised in four hours and moved to a new location. Respondent is unable to determine on what basis petitioner makes the unsupported statement that the Coast Guard does not consider drill barges as being in navigation. In no sense could it be said that the W W-1 was similar to a deactivated Liberty Ship which had been used as a grain warehouse for nine years before the accident. With respect to Question "A", there is no reason for this Court to exercise its discretion to review the trial judge's charge on "vessel in navigation."

DISCUSSION OF QUESTIONS (B)

Petitioner's contention under Question (B) is a patent request for this Court to exercise appellate rather than writ jurisdiction. Petitioner's requested instructions, based as they generally were on *Roper v. United States*, supra, were rejected by an able and experienced trial judge. Petitioner had its appeal to the Court of Appeals which, again, rejected the requested instructions. Under the law, the matter should end there.

Petitioner now asks this Court to review that which has been repeatedly reviewed, not because the language in the trial court's instruction was legally erroneous, but because the trial judge specifically related correct statements of the law to the fact situation confronting the jury. The short answer is that in federal court the trial judge may comment on the evidence and could even have expressed his opinion on some prospective finding of fact. Of course, the trial judge did not go so far here. The trial judge merely told the jury what they could find and what the Jones Act could comprehend. All this was done in terms of what petitioner calls "correct statements of the law in the abstract."

Petition for Writ of Certiorari, p. 7.

Precisely what is improper about a judge, who is permitted to comment on the evidence, relating correct statements of the law to a given fact situation, petitioner does not suggest. And, of course, not only is it proper, but makes good sense. In the words of the Honorable John Minor

Wisdom, in *Offshore Co. v. Robison*, (5 Cir.) 266 F.(2d) 769, 780:

> "The absence of any legislative restrictions enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico."

In this same vein, the law makes it clear that the essential elements of "vesselness" are buoyancy, capacity to do work on water, means of transportation on water and present capacity to navigate. These are concepts common to the average layman's notion of what a vessel is. However, it must be made clear to a jury that not every vessel has one blunt end and one sharp end and plies the North Atlantic, and that not every seaman wears bell-bottomed trousers. In addition to setting down the broad, though relatively simple, factors determining "vesselness," the trial court is within its proper province when it illustrates the variety of circumstances covered by the Jones Act. Clearly, Question (B) does not commend itself to this Court's exercise of certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, respondent submits that the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

JOHN P. NELSON, JR.
Attorney for Respondent

On the Brief
JOHN R. MARTZELL

CERTIFICATE

I hereby certify that a copy of the foregoing Opposition to Writ of Certiorari, on behalf of EUNICH P. SAUNIER, has this day been placed in the United States Mail, postage prepaid, addressed to Mr. Ford Reese, Attorney for Petitioner.

JOHN P. NELSON, JR.

New Orleans, Louisiana, this

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1965.